

BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

'99 OCT 12 AM 11 26

IN RE:

SHOW CAUSE PROCEEDING AGAINST
MINIMUM RATE PRICING, INC.

)
) DOCKET NO. 98-00018
)
)

ORIGINAL

RESPONSE IN OPPOSITION TO MRP'S PETITION FOR RECONSIDERATION

Comes the Consumer Advocate Division of the Office of the Attorney General in opposition to MRP's Petition for Reconsideration and respectfully requests that the company's petition be denied. MRP fails to show that a material error of fact or law was committed or any new evidence which supports reconsideration has been discovered. MRP is simply rehashing its earlier arguments.

MRP first alleges that the Authority has failed to act on its Petition for Reconsideration; however, there is no statutory requirement for action on a Petition for Reconsideration.

Substantial and material evidence supported the Authority's decision.

MRP next argues that the May 11, 1999 and September 16, 1999 orders are not supported by "facts and law." The record in this case includes the testimony of consumers, the staff of the TRA and the testimony of Mr. Kenna of MRP. Every person testifying, including Mr. Kenna, disclosed facts which provided substantial and material evidence that MRP violated the statutes of the State of Tennessee and the rules and orders of the Authority. With regard to resolution of the burden of proof, this proceeding arose out of a Tenn. Code Ann. § 65-2-109 Show Cause order directing MRP to show cause. Tenn. Code Ann. § 65-2-109 (5) provides that the burden of

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proof is on the party directed to show cause.

The Authority's action was solely intrastate in nature.

MRP next argues that the Authority is illegally attempting to regulate interstate rates. Nothing could be further from the truth. No party argued that MRP's interstate certificate should be revoked. MRP fails to identify any order, portion of any order or even a statement of the opponents supporting an intent to regulate the company's interstate conduct. Moreover, MRP is free to negotiate an agreement with incumbent local exchange companies which will permit it to solicit and serve interstate customers, so long as it does not do business in this state by completing calls from Tennessee consumers to Tennessee consumers.

There was no conflict of interest or improper communication.

In MRP's next two paragraphs it argues that the Authority had an "impermissible conflict of interest" stemming from contact the Authority had with the Office of the Attorney General. This allegation stems from the Consumer Advocate Division's March 25, 1999 Motion for the Tennessee Regulatory Authority to exercise its regulatory power to protect the public interest.¹ MRP's subsequently alleged preemption of Tennessee statutes and attempted to create a conflict of interest between Tennessee consumers and the State of Tennessee.²

MRP alleged that it filed bankruptcy in an out of state forum.³ The letter alleged that

¹See, e.g. Tenn. Code Ann. § 4-5-320. The Consumer Advocate Division had repeatedly requested the agency to order MRP to cease and desist from billing and charging customers in violation of Tenn. Code Ann. § 65-4-125 and other statutes.

²Under MRP's position if the TRA took action in favor of consumers, the State of Tennessee itself would be liable.

³April 2, 1999 letter from MRP counsel Walter Dierks to K. David Waddell, Executive Secretary of the Tennessee Regulatory Authority. Attachment A.

MRP's show cause proceeding had been stayed by the Bankruptcy Court; disclosed the name and address of MRP's bankruptcy counsel; and the authority presented in MRP's letter asserted that the state could incur financial liability.

The Consumer Advocate Division of the Office of the Attorney General was participating in the hearing at the time MRP made its allegation of bankruptcy. MRP and the legal authority it submitted alleged that the state could incur a monetary liability to the bankruptcy trustee if it found against MRP.

The duties of the Attorney General are prescribed in Tenn. Code Ann. § 8-6-109. These duties include, but are not limited to, giving legal advice to state officials, when such advice pertains to the discharge of their legal duties Tenn. Code Ann. § 8-6-109 (b)(5); written opinions Tenn. Code Ann. § 8-6-109 (b)(6) which are provided to the public; and to defend the constitutionality and validity of state legislation.

Directors of the Tennessee Regulatory Authority are state officials. Tenn. Code Ann. § 65-1-201. The Attorney General has a duty to provide opinions to state officials. MRP threatened the Tennessee Regulatory Authority, the state's financial status, and the constitutionality of state legislation, by alleging that the TRA would incur financial liability under federal law for enforcing Tennessee law. In addition, MRP alleged that state law was preempted. The Attorney General has a duty to defend state law unless he makes a decision that he will not defend. The Attorney General performed his duty and there was no conflict of interest or improper communication.

The Consumer Advocate Division, when appearing before the agency, does not represent the state as a political entity. The division has the duty and authority to represent the interests of

Tennessee consumers pursuant to Tenn. Code Ann. § 65-4-118.

Apparently, MRP's threat to the Tennessee Treasury caused the Authority to seek advice from the State's lawyer, the Tennessee Attorney General. The Attorney General contacted MRP's out of state bankruptcy counsel and provided a copy of the communication to the parties.⁴ The letter advised bankruptcy counsel for MRP that the State of Tennessee did not consider the authority presented by MRP's counsel to be adequate enough to warrant interference with the regulatory process. There was no improper communication.

The absence of improper communication is also evident from subsequent filings by the parties. The Authority required the parties to the case to brief the jurisdictional matters.⁵ The Consumer Advocate Division, without consulting counsel representing the Tennessee Regulatory Authority for the bankruptcy matters, and after entirely independent research, arrived at a more far reaching interpretation than that reached by bankruptcy counsel. The Consumer Advocate Division argued that the federal bankruptcy code would be unconstitutional as applied to the Tennessee Regulatory Authority or the State of Tennessee, so long as the State did not waive its Eleventh Amendment Sovereign Immunity.⁶ The Consumer Advocate Division independently demonstrated that the case cited by MRP was not good law. There simply were no ex parte communications or conflicts of interest.

Finally, MRP never petitioned the TRA for disqualification of any person for bias,

⁴Attachment B, April 5, 1999 letter from Kathleen Ayres, Chief Bankruptcy of the Office of the Tennessee Attorney General to Bruce Frankel, bankruptcy counsel for MRP.

⁵April 7, 1999 Order of the Tennessee Regulatory Authority.

⁶April 14, 1999 Brief of the Consumer Advocate Division.

interest, prejudice or any other cause. Tenn. Code Ann. § 4-5-302. Moreover, Tenn. Code Ann. § 4-5-304 (b) expressly provides that the agency can seek aid from the Attorney General & Reporter; and there is no allegation that the aid furnished, augmented, modified, or diminished evidence in the record. All parties were given the opportunity to contest and rebut the information in the Attorney General's letter in accordance with Tenn. Code Ann. § 4-5-313 (6) by the Tennessee Regulatory Authority's April 6, 1999 Order. MRP's baseless conflict and ex parte arguments are merely tactics to game the system after its ineffective bankruptcy strategy failed to shield and promote its unlawful conduct.

MRP's next two allegations (paragraphs 5 and 6) continue to rehash old allegations.

Paragraph 7 of MRP's Petition alleges that the Tennessee Regulatory Authority improperly considered allegations against MRP and its executive, Drew Kenna. The company's allegations are without merit. Once it became apparent in the evidence that MRP had a pattern and practice of violating the law and gaming the system, the Consumer Advocate Division made motions for the agency to act to protect consumers. The agency first sought to effect a balance by permitting MRP to agree to a cease and desist order. MRP, however, would not agree to the cease and desist order which was a true "cease and desist" order. The Consumer Advocate Division subsequently renewed its motion and the TRA granted the motion.

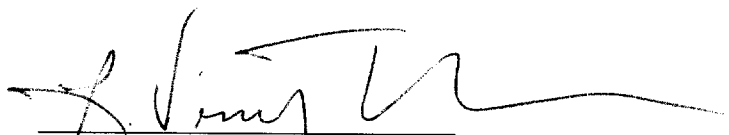
As MRP notes, it had several weeks after the March 25, 1999 motion to refute any allegations and to contest the Consumer Advocate Division's motion. Furthermore, it could have responded under Tenn. Code Ann. § 4-5-313 (6). It elected not to do so. Its voluntary waiver should not be grounds for a rehearing.

The evidence in this case clearly and unequivocally showed that MRP has demonstrated

that it will not comply with the rules, regulations and orders of the Authority or the laws of the State of Tennessee. The company was violating Tenn. Code Ann. § 65-4-125 and other statutes and authority rules. It made material misrepresentations to persons it solicited. As a result revocation of its certificate to do business in Tennessee was warranted.

The company presents no valid grounds supporting a rehearing and its Petition for Reconsideration should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'L. Vincent Williams', written over a horizontal line.

L. Vincent Williams
Deputy Attorney General-Consumer Advocate
Consumer Advocate Division
425 Fifth Ave., North, Second Fl.
Nashville, TN 37243
B.P.R. No. 011189
615-741-8700

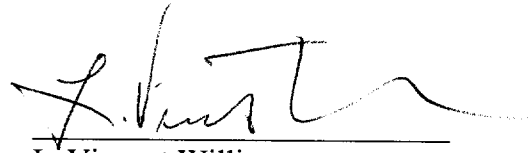
CERTIFICATE OF SERVICE

I, L. Vincent Williams, hereby certify that a copy of the foregoing response was served on the following parties of record by depositing a copy of the same in the United States mail, postage prepaid, addressed to them, in accordance with the following list, this 12th day of October, 1999:

Jerry Colley, Esq.
Counsel for Minimum Rate Pricing
710 N. Main St.
P.O. Box 1476
Columbia, TN 38402-1476

Carla Fox, Esq. or the designee
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN. 37243

Walter E. Diercks
Eric M. Rubin
Sarah B. Colley
Counsel for Minimum Rate Pricing
1333 New Hampshire Ave., N.W., Ste. 1000
Washington, D.C. 20036



L. Vincent Williams

APR 02 '99 11:49AM

P.2/5

RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, L.L.P.

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ATTORNEYS AT LAW

TENTH FLOOR

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April 2, 1999

**BY FACSIMILE, FEDERAL EXPRESS,
AND U.S. EXPRESS MAIL**

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Docket No. 98-00018
Show Cause Proceeding Against Minimum Rate Pricing, Inc.

Dear Mr. Waddell:

This is to inform the Tennessee Regulatory Authority that Minimum Rate Pricing, Inc., the subject of the above-captioned Show Cause Proceeding, filed a petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Section 1101, *et seq.*, on February 26, 1999. A copy of the first page of the MRP petition is enclosed for your information.

Please be advised that the instant Show Cause proceeding has been automatically stayed by Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362. I call to the Authority's attention *Fugazy Express, Inc. v. Shimer*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). Any issue regarding the scope and effect of the automatic stay and any request for relief from the automatic stay must be presented to and resolved by the United States Bankruptcy Court for the District of New Jersey, Newark Division.

Because this proceeding has been stayed, MRP is not filing a response to the Motion for Exercise of Police and Regulatory Authority to Protect the Public Interest, which was filed in violation of the automatic stay on March 24, 1999 by the Consumer Advocate Division of the Office of the Attorney General and Reporter. We believe that the substance of the CAD's Motion is subject to the stay.

STATE OF TENNESSEE

Office of the Attorney General



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ATTORNEY GENERAL AND REPORTER

ANDY D. BENNETT
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Bankruptcy Unit

April 5, 1999

Writer's Direct Numbers:
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BY FACSIMILE: (212) 752-8393 and U.S. MAIL
Bruce Frankel, Esq.
Angel & Frankel, P.C.
460 Park Avenue
New York, N.Y. 10022-1906

Re: Tennessee Regulatory Authority Show Cause Proceeding
Against Minimum Rate Pricing, Inc. TRA Docket No. 98-00018
Bankr. Case No. 99-32136, District of New Jersey

Dear Mr. Frankel:

I am in receipt of a copy of the letter and facsimile of April 2, 1999, from Walter E. Diercks to the Tennessee Regulatory Authority. Since his letter asked that any response be directed to you, I am doing so.

Please be advised that the position of the Tennessee Regulatory Authority is that it is not bound by Shimer v. Fugazy, the case cited by Mr. Diercks. First, this is an old case, and as you know, the exception for the exercise of police and regulatory authority in §362(b) was amended last October to make it clear that exercising control of property of the estate is permissible in the exercise of police and regulatory authority. Second, Shimer is distinguishable on its facts. In that case, the FCC simply transferred property. It was not engaged in a determination of whether the debtor had violated its operating authority or operated illegally -- activities which might be grounds for revocation of a license. Finally, Shimer does *not* stand for the proposition that only the bankruptcy court can determine the scope of the automatic stay. Shimer does not address this issue at all and in fact, the 2nd Circuit long ago determined otherwise. "The Court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the precise question whether the proceeding pending before it is subject to the

Mr. Bruce Frankel

April 5, 1999

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automatic stay." Erti et al. v. Paine Webber Jackson & Curtis, et al., 765 F2d. 343 (2nd Cir. 1985.)

Allegations before the Tenn. Regulatory Authority against MRP assert continuing violation of Tennessee law. Violation of state law is a violation of federal law through 28 USC § 959, and the State is clearly entitled to exercise its police and regulatory power to protect the it's citizens. Nothing in the Bankruptcy Code suggests that a debtor may reorganize through a continuing pattern of illegal conduct or fund its plan with fraudulently obtained revenue. These are the allegations before the TRA, and it has the authority and jurisdiction to determine whether they are well-founded.

The TRA will not be demanding a payment of sanctions or restitution for consumers in the proceeding presently scheduled for April 6, 1999. However, it can determine whether Tennessee law has been violated. The evidence which the TRA will be considering was presented some time ago -- well before the bankruptcy petition was filed -- and the not-yet-debtor participated fully at that hearing. Whether the Debtor responds to any motion is certainly up to the Debtor. However, failure of a response by the debtor will not stay tomorrow's hearing.

If you have any questions, please feel free to call me.

Sincerely,


Kathleen Ayres
Chief Bankruptcy Counsel

cc: Walter E. Diercks, Esq.
K. David Waddell
L. Vincent Williams, Esq.
Richard Collier, Esq.
Gary Hotredt, Esq.

STATE OF TENNESSEE

OFFICE OF THE

ATTORNEY GENERAL

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FAX COVER PAGE

Transmitting 3 pages, including cover page;

To: Vincent Williams

FAX No.: () 1-8724

From: Kathleen Ayres *KAY*
Chief Bankruptcy Counsel

Date: 5 April 1999

Re: MRP

Comments:

Vince, I'm going to go over a few minutes early tomorrow to talk to Richard Collins, so I guess I'll see you there.

IF TRANSMISSION PROBLEMS ARE ENCOUNTERED, PLEASE CONTACT OUR OFFICE AT (615) 532-2504.

The information contained in this facsimile message is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee of agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the above address via the U. S. Postal Service. Receipt by anyone other than the intended recipient is not a waiver of any attorney-client or work-product privilege.

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April 2, 1999

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AND U.S. EXPRESS MAIL**

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RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, L.L.P.


Mr. K. David Waddell
April 2, 1999
Page 2

Please direct all correspondence regarding the MRP bankruptcy or the automatic stay to
MRP's bankruptcy counsel:

Bruce Frankel, Esq.
Angel & Frankel, P.C.
460 Park Avenue
New York, N.Y. 10022-1906
Telephone: (212) 752-8000

I further request that a copy of this letter be placed in the docket for the above-captioned
proceeding.

Very truly yours,


Walter E. Diercks

cc: L. Vincent Williams, Esq. (with enclosures)
Carla G. Fox, Esq. (with enclosures)
Bruce Frankel, Esq. (without enclosures)